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Supreme Court of the United States

OCTOBER TERM, 1957

EDWARD R. ESTES and LORRAINE M. ESTES, His Wife; DONALD F. OWENS and JEAN OWENS, His Wife; and ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His Wife, *Petitioners*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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THE ARGUS PRESS, SEATTLE

No. 873

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION[1]

QUESTION AS PRESENTED BY BRIEF IN OPPOSITION (Br. 2)

The absence of a statement that the government failed in its burden of proof to prove its right to the exclusive possession of the lands owned by petitioners underlying the buildings involved is fatal in its presentation of the question. Actually, the trial court held that the government had failed to prove, as alleged in its complaint (Par. VIII, R. 8), that it had the exclusive right of possession of the land (Suppl. Fdgs. I and II, R. 107-108). The question is not therefore whether the

[1] Br. references are to the brief in opposition. Pet. references are to the petition for a writ of certiorari. In reply to footnote 1 (Br. 1) petitioners set forth applicable portions of the decision (Pet. 33-35) of the court of appeals in the belief, still held, that Rule 23(1)(j) applied. The amended opinion was appended in full (Pet. 36-37). The government's printing in full is appreciated.

government had lost all interest in the underlying realty but, rather, what interest does it have as a matter of law when it fails to prove its alleged right of exclusive possession. The trial court expressly found that the government failed to prove (R. 108) that it had paid the just compensation decreed in the amended orders of condemnation in a cause introduced in evidence by the government to prove its right to possession. Since the findings constitute the facts it is strange that the government in its presentation of the question refers to "alleged" nonpayment of just compensation. All the consequences in law following the government's failure to prove its alleged right to exclusive possession of the land are set forth in the petitioner's presentation of the questions (Pet. 3-5).

It follows that such failure by the government does constitute a complete defense to the government's action.

ARGUMENT

1. The government introduces new matter *de hors* the record (Br. 8) which is of great significance. This reply is made necessary to point out sharp practice and petitioners frankly do not know how to do it.

The government states (Br. 8) that it had paid just compensation, and in footnote 7 states that all annual rentals had been paid, that taxes (a part of the rent decreed as just compensation—Pet. 43-44) had not been paid because of a refusal by the successors in interest (an obvious reference to petitioners) to follow the established practice of submitting their tax bills. Nowhere in the record in the trial court, nor in the find-

ings, nor in the record before the court of appeals or this court is there evidence of such a refusal by petitioners.

Further, the last sentence in said footnote asserts: "These facts are established in the condemnation proceedings of which the district court took judicial notice." The court took judicial notice of the proceedings which were in a separate cause but could not judicially note facts not to be found therein. The court gave the government several weeks' continuance to produce proof of payment of just compensation. At the hearing the government failed to furnish the requested proof. Instead it filed an affidavit and a ten-page brief regarding taxes and practices (Documents numbered, respectively, 121 and 122 in the files before the trial court) (R. 135). The trial court thereupon reversed its first findings that the government had the exclusive right of possession and entered supplemental findings that

> "it was incumbent upon the plaintiff herein to prove its exclusive right of possession of the land upon which the buildings . . . involved herein have, at all times material to this action, been and are now located" (Fdg. I, R. 107-108)

and, that the plaintiff had not sustained that burden in that

> " . . . the plaintiff has not proved that . . . installments of . . . just compensation have been paid; therefore, the Court cannot find that such installments have been paid. . . . This finding is based upon the necessity of the plaintiff establishing, in this action, its exclusive right of possession of said real estate."(Fdg. II, R. 108)

This court has its choice of accepting the trial court

findings or the bald assertion of the government that the court took judicial notice of the very facts which the government did not prove.

The reason for this petition is to clarify the uncertainty raised by the court of appeals as to the meaning of the findings concerning exclusive possession (Pet. 36). Clearly, the record shows that the trial court did most thoroughly consider the government's claim and rejected it. The trial court first granted removal of the houses (Concl. X, R. 77-80), and concluded that the government should have an injunction restraining interference with the government's enjoyment of the land (Concl. XI, R. 80), and that the government should have damages for the wrongful use of the land "underlying said buildings . . . from the time of said breaches of contract to and including the present time; . . . " (Concl. XII, R. 80-81). Later, and as related above, the trial court reversed its findings after the government failed to sustain the burden of proof in proving its right to exclusive possession of the land by failing to produce proof of payment of just compensation. That the trial court gave this issue the full gamut of consideration appears from the first findings. In view of this the uncertainty of the court of appeals is not understandable. It is unjust to force petitioners as land owners to meet again the issue of proof of right to exclusive possession in another attempt by the government to obtain damages for alleged wrongful use of the land.

2. Item 2 of the government argument (Br. 7) is that the government still had the right of possession because the trial court stated that in approximately two months

the defendants (petitioners) "would have the right of exclusive possession of said lands and the right to move said buildings back on said lands; . . . " (Supp. Fdg. III, R. 108-109). But the trial court finding had already decided that the government had not proved its right to exclusive possession. So far as the issue is and was settled the government had nothing. Any language about what sort of rights the petitioners or any other person might have in the future does not set aside the government's failure of proof and give the government possession. If the government felt it still had some right of possession it should not have withdrawn its appeal when the first sweeping findings in its favor were reversed[2] (R. 142-143).

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[2] As the court of appeals holds, the petitioners are not privy to the contract to remove (Br. 15) and so they were not amenable to specific performance. If the government had proven its right to the exclusive possession of petitioners' lands the government could have removed the buildings (R. 16, item 6) or the parties to the contract could have been made to perform. If it did not have exclusive possession for that purpose can it be conjectured that it might have had the right of possession during part of the time? The court of appeals recognized this fatal defect in proof but felt in its amended opinion (Pet. 36) that this could be corrected by subsequent payments of just compensation. The government was given every opportunity (*supra*, p. 3) to prove subsequent payments for the times material to the action on trial, including several weeks' continuance in the spring of 1956 and failed.

As is indicated from the findings a government agent (Fdg. V, R. 65) assisted in making the only assignment in the record. The brief in opposition quotes the contract provision prohibiting assignment of the contract or interest therein (Br. 3, Ftn. 3). Like footnote 7 petitioners believe this is inserted to mislead this court because there is no evidence in the record, nor is there any finding that the petitioners now before this court took an assignment. Buying two buildings as second and third party purchasers (Fdg. XI, c., d., R. 69-70) does not constitute an assignment. The City of Seattle allowed petitioners to use the streets and alleys upon which part of the buildings were situate, the buildings were altered to comply with the city codes (Fdg. XV, R. 72-73). Despite all of this and the expense involved the court originally concluded as a matter of law that since the government had the right of ex-

3. In its statement (Br. 6), the government states that the trial court concluded that the government was entitled "to the specific and other relief sought." To clarify the uncertainty raised by the court of appeals (Pet. 36-37; Br. 7) as to whether the meaning of the finding concerning exclusive possession was made only in connection with specific performance we italicize *and other relief sought*. The conclusion was that the government was entitled to damages for *wrongful use of the underlying land* from the dates of the breaches of the contract "to the present time" (Conc. XII, R. 80-81), and that it was entitled to a decree enjoining against any interference with enjoyment of "said exclusive use" (Conc. XI, R. 80).

The court abrogated these first findings and entered supplemental findings (R. 107-108) that the government had failed to prove its right to exclusive possession of the lands. Because of the elimination of damages for alleged wrongful use of the lands by petitioners the government now contends, resting on the uncertainty of the court of appeals, that "The case has been remanded simply to give the United States an opportunity to prove its claims within the scope of the pleadings . . . " (Br. 7). It not only had the opportunity—it first prevailed on the very issue that the court of appeals is uncertain about, namely, the possibility "that there may have been a trespass, or the existence of circumstances from which a contract to pay the reasonable rental value

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clusive possession of the land the petitioners should be ordered to move the buildings and clear the sites to a depth of several feet which meant lifting sewers and plumbing newly installed (Concl. X, 77 80), and it was immaterial that the petitioners could move the buildings back on the lands which they owned upon termination of the government's term.

of the lands may be implied" (Br. 17). But the court of appeals also stated (Br. 17):

> "This would not be true if the government did not have the exclusive right of possession of the land during any of the time when these appellants owned the houses. . . .
>
> "We are not certain that this is the purport of the supplemental finding relative to exclusive right of possession. This finding was made only in connection with the question whether specific performance should be ordered. With regard to this, only the government's immediate right to exclusive possession at the time the matter was before the court was important. . . ."

But the court of appeals overlooks that the times involved were from the dates of the breach of contract in Nov., 1953 (Fdg. IX, R. 67-68; item 3, R. 9), to the present time which was the date of the trial in September, 1955 (R. 62).

The trial court did consider the government's right of possession at all times material to the action which included from 1945 (Fdg. XII, R. 70-71) through Nov. 2 or Nov. 12, 1953, the times pleaded as breaches of contract (item 3, R. 9 and Fdg. IX, R. 67) and through the unauthorized extension[3] date January 15, 1954 (Fdg. IX, R. 67-68). The court would not have eliminated the other relief if the government had proved its right to

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[3] Footnote 6 (Br. 5) refers to an unauthorized extension of the time for the performance of said contract by the agent Michaelson. Again since petitioners are not parties thereto and the court of appeals in its decision states that petitioners are not privy to the contract (Br. 15) we cannot understand why the government here seeks to involve this court in said matter other than to keep confusing and commingling the cause of action on the contract with the cause of action based on exclusive use.

exclusive possession "during any of the time when these appellants owned the houses" (Amended opinion, Pet. 36). Petitioners acquired the Barnett and Owens houses on Jan. 20, 1954, and Ester house in Nov., 1953 (Fdg. XI, R. 69-70 item c. as to Barnett and Owens; item d. as to Ester. The date of 1954 in d. has been corrected to 1953—and indicated in the decision of the court of appeals at Br. 12). The retrial of the issue of wrongful use of the land will again require proof by the government of its right of exclusive use thereof paramount to that of the petitioners as the owners. This in turn requires again that the government prove its compliance with the decrees of just compensation in the separate condemnation proceeding upon which it rests its claim. This is the same proof already litigated. Contrary to the government's argument (Br. 8) petitioners did not contend nor did the trial court find that the original condemnation proceedings were void.[4] It is submitted that

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[4] The first case (Br. 8) cited by the government deals with an appeal from an inadequate award in a condemnation of land. The court would not make an allowance for the value of improvements erected thereon by the government during the term of a negotiated lease, and which the government had the right to remove before termination. The government condemned to continue a lawful purpose and made a deposit of estimated just compensation. It is not in point. In the present cause the government sold all the buildings and had in fact had its use of streets and alleys upon which the buildings were partly situate cancelled by the City of Seattle on Oct. 28, 1953 (Fdg. XV, R. 72-73). Furthermore, in the present cause the Government did not condemn the fee before expiration of its temporary annual term. The second cited case (R. 8) held that the issue of damages for removal and other costs was *res judicata* in a suit by a tenant against the owner of a building which had been condemned in a separate action in which the tenant was awarded just compensation. The case is no support for the government, and might be said to be authority for the petitioners in that the issue of damages to the government for wrongful use of the land underlying the buildings at all times material to the action was most thoroughly considered by the trial court.

the issues which the government wants to try again have been tried once and have been decided, as shown by the reversed findings.[5]

CONCLUSION

It follows that the petition for certiorari and the motion for summary reversal should be granted. This court should exercise its supervisory function so as to keep the review by the court of appeals within the findings. The practical effects of the judgment of the court of appeals is to create confusion for other litigants involved in a review based on the findings.

Respectfully submitted,

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[5] The parties to the contract have not petitioned for certiorari and the remand of the court of appeals directs a new trial on the issue of damages for breach of contract. But the government is not satisfied and wants another opportunity to prove its right of exclusive possession as against petitioners who are not parties to, nor assignees of, the contract, in an effort to collect damages for the alleged wrongful use of petitioners' own land by petitioners, on the theory of trespass or for reasonable rent.

The court of appeals remanded for a new trial against Century Investment Company, a party to the contract for removal, on the issue of damages for breach of contract, and also against Virgil J. Pague, its president at the time; these parties are not petitioners here.